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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. BARRY REED, Defendant and Appellant.	B167745 (Los Angeles County Super. Ct. No. BA241335)

APPEAL from a judgment of the Superior Court of Los Angeles County. Anita H. Dymant, Judge. Affirmed.

Laurance S. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Barry Reed of selling cocaine, with findings he had a prior felony conviction within the meaning of the "Three Strikes" law, and had served a separate prison term for a felony. (Health & Saf. Code, § 11352, subd. (a)); Pen. Code, §§ 667, subd. (b)-(i); 1170.12, subds. (a)-(d); 667.5, subd. (b).) He was sentenced to an aggregate state prison term of eight years. On appeal from the judgment, he challenges the sufficiency of the evidence to support his conviction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

On December 30, 2002, Los Angeles Police Officer Mario Barillas was working with an undercover buy team. He approached Reed (appellant) on the street and arranged to purchase a "dime" of "rock" or $10 worth of rock cocaine. The officer followed appellant to a building, gave him a previously marked $10 bill, and waited for appellant to return. Appellant emerged from the back of the building and handed Barillas an off-white rock resembling rock cocaine. Appellant asked Barillas to break off a piece for him. The officer declined, walked away, and gave the predetermined "buy" signal to fellow officers who arrested appellant.

A criminalist later analyzed and confirmed the off-white rock to be 0.13 grams of a substance containing cocaine base.

Defense Evidence

Appellant testified in his own defense and admitted that he used cocaine and knew where to purchase it in the area. When Officer Barillas requested a "dime," appellant responded: "I don't sell cocaine but if you give me a piece, I can show you where to get it." The officer refused to give him a piece. Appellant showed Barillas where he could purchase rock cocaine. Appellant followed the officer, hoping to persuade him to give him a piece. He saw Barillas buy rock cocaine from a young Black man.

DISCUSSION

Appellant argues the evidence is insufficient to support his conviction because the prosecution failed to show he sold a usable quantity of cocaine. Specifically, he points to the absence of testimony to that effect by the officer and criminalist. Additionally, appellant faults the trial court for not instructing sua sponte that the prosecution had to prove he possessed a usable amount of cocaine. Both claims are meritless.

Appellant was convicted of selling rock cocaine. (Health & Saf. Code, § 11352, subd. (a).)[1] "A conviction for selling controlled substances does not require proof of possession at all, much less possession of a usable quantity. [Citations.]" (*People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524; see *People v. Wesley* (1986) 177 Cal.App.3d 397, 400; *People v. Hardin* (1983) 149 Cal.App.3d 994, 998-999; *People v. Diamond* (1970) 10 Cal.App.3d 798, 801; *People v. Case* (1969) 270 Cal.App.2d 712, 714.)

Appellant misapprehends the *Leal* rule,[2] which stands for the proposition that nonusable trace amounts of an illegal drug cannot be the basis for a possession offense because such evidence does not show the defendant's knowing possession of the drug.[3] The *Leal* usable-quantity rule applies to cases involving the possession of drugs; it does not apply to cases involving the sale of drugs because the fact the parties to the transaction treated the quantity as salable is taken as evidence that it was a usable

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[1] "[E]very person who transports, imports into this state, sells, furnishes, administers, or gives away, . . . any controlled substance [namely cocaine]" is guilty of a crime. (Health & Saf. Code, § 11352, subd. (a).)

[2] *People v. Leal* (1966) 64 Cal.2d 504.

[3] "[T]he *Leal* usable-quantity rule prohibits conviction only when the substance possessed simply cannot be used, such as when it is a blackened residue or a useless trace. It does not extend to a substance containing contraband, even if not pure, if the substance is in a form and quantity that can be used. No particular purity or narcotic effect need be proven." (*People v. Rubacalba* (1993) 6 Cal.4th 62, 66.)

quantity. (*People v. Mata* (1986) 180 Cal.App.3d 955, 959; see also *People v. Hardin, supra,* 149 Cal.App.3d at p. 998, citing *People v. Diamond, supra*, 10 Cal.App.3d at pp. 800-801; *People v. Karmelich* (1979) 92 Cal.App.3d 452, 455-456.) In the instant case, the evidence is overwhelming that the recovered cocaine was salable. Both appellant and Barillas testified it was "dime" of "rock" or $10 worth of rock cocaine on the street.

We also reject appellant's assertion the trial court erred by not instructing on the usable quantity element of a possession offense. Possession of a controlled substance is not a lesser included offense of sale of a controlled substance. (*People v. Peregrina-Larios, supra,* 22 Cal.App.4th at pp. 1523-1524.) Appellant is not entitled to instructions on a lesser-related offense.[4] (*People v. Birks* (1998) 19 Cal.4th 108, 136.) Accordingly, the trial court did not err.

DISPOSITION

The judgment is affirmed.

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WOODS, J.

We concur:

PERLUSS, P.J. JOHNSON, J.

[4] The state of the evidence did not justify a requested instruction in any event.